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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1986

DALE E. KRAUS, ET UX., ET AL.,

Respondents/Appellees,

v.

COUNTY OF PIERCE, ET AL.,

Petitioners/Appellants,

# PETITIONERS' REPLY BRIEF

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## I. RESTATEMENT OF THE CASE

Although respondents misstate several facts, most bothersome is the baseless allegation that they were ordered "out of their homes at gunpoint . . ." Resp. brief at 7. Not only is the record devoid of support for such a claim, but Dale Kraus testified he was unaware deputies were present until after he stepped out of his house (App. C at 21, 31-34). Further, respondents revealingly do not disclose that after Kraus was asked to come to the front door to talk, both he and Todd Montgomery instead suddenly appeared from two separate exits with Kraus moving swiftly toward the deputies with an object feared to be a weapon in his hand (App. C at 27, 31-32, 37, 45).

Although respondents seek to confuse

issues by asserting the telephone call was an "intrusion" and that their house was later "searched," Resp. brief at 3, 7, 9, the Court of Appeals properly ignored this first claim and expressly ordered judgment for petitioners on the second. See Kraus v. Pierce County, 793 F.2d 1105, 1110 (9th Cir. 1986). Rather, the issues on appeal are: 1) May a municipal employer appeal the denial of summary judgment where the issues are similar to their officers' appeal on immunity; 2) were the deputies' precautions within the scope of an investigatory stop; 3) may officers rely on previous precedent to determine when a right is "clearly established"; and 4) should state case law be considered in analyzing if similar facts have been "clearly established" as constituting probable cause?

BEST AVA

## II. REPLY TO RESPONDENTS' ARGUMENT.

### A. Denial of Petitioners' Motion Is Appealable Under Mitchell And San Filippo.

Respondents assert the denial of the deputies' motion for summary judgment is not appealable because there are disputed factual issues regarding probable cause. However respondents do not identify these "facts," and both the information possessed by the deputies and the events at the house are undisputed. Respondents actually are attacking Mitchell v. Forsyth, ___ U.S. ___, 86 L.Ed.2d 411, 419, 105 S.Ct. 2806 (1985) which held that "the appealable issue is a purely legal one, whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law."

Although the Court of Appeals on the



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other hand did reject the County's right to appeal, Kraus, 793 P.2d at 1108, petitioners have demonstrated such was in conflict with San Filippo v. U.S. Trust Co. of New York, 737 F.2d 246 (2nd Cir. 1984). Pet. for Writ of Cert. at 28-30. Respondents fail to address either this precedent or the issue raised by it.

B. Certiorari Should Be Granted To Correct A Departure From This Court's Decisions Distinguishing "Investigatory Stops" From "Arrests."

Like the Ninth Circuit, respondents confuse an "arrest" with a "seizure" by their erroneous belief that an arrest exists when "a reasonable person would have believed that he was not free to leave." Resp. brief at 6; Kraus, 793 F.2d at 1109. Rather, some "seizures . . . involve only a brief detention short of traditional arrest" and require only reasonable suspicion. See United

States v. Mendenhall, 446 U.S. 544, 551, 64 L.Ed.2d 497, 100 S. Ct. 1870 (1980) (emphasis added). Although respondents quote the appropriate test for a seizure, Id. at 554, such is not the test for the "type" of seizure known as an arrest. Pet. for Writ of Cert. at 19-21.

Respondents assert that the deputies lacked even "reasonable suspicion," but the facts known to the deputies at least were a "particularized and objective basis for suspecting the particular person stopped of criminal activity." See United States v. Cortez, 449 U.S. 411, 417, 66 L.Ed.2d 621, 1101 S. Ct. 690 (1981); Pet. for Writ of Cert. at 23-24.

The true issue at this point is whether the scope of an otherwise valid investigatory stop was exceeded so as to become an "arrest" requiring probable cause. Because the Ninth Circuit applied

the wrong test and erroneously concluded that the deputies' conduct constituted an "arrest" rather than a "stop," Pet. for Writ of Cert. at 20-27, its decision conflicts with the applicable decisions of this Court and requires review. See Sup. Ct. R. 17.1(c).

C. Certiorari Should Be Granted To Decide Whether A Federal Right Is "Clearly Established" By Previous Precedents Analyzing Similar Facts.

Respondents allege their rights were "clearly established" because it was settled at the time of the incident that "an arrest without probable cause violates the constitutional rights of the person arrested." Resp. brief at 5. However, petitioners assert that where prior precedent exists upholding similar conduct, officers are immune when they conform their actions to it. Here, previous Washington and Ninth Circuit authority

had upheld far more intrusive precautions as within the scope of an investigatory stop. See U.S. v. Taylor, 716 F.2d 701 (9th Cir. 1983); State v. Wakeley, 29 Wn.App. 238, 628 P.2d 835 (1981); Pet. for Writ of Cert. at 25-27.

Respondents' however choose not to confront how these cases affect the scope of an investigatory stop, but instead attempt to distinguish them on the irrelevant ground that there the officers allegedly had stronger reasonable suspicion. Resp. brief at 8. Because this Court has yet to state how a federal right is "clearly established", Harlow v. Fitzgerald, 457 U.S. 800, 818 n.32, 73 L.Ed.2d 396, 102 S. Ct. 2727 (1983), the Ninth Circuit decided an important question of federal law which has not been, but should be, settled by this Court. See Sup. Ct. R. 17.1(c).

D. Certiorari Should Be Granted To Resolve The Split Whether State Decisions Should Be Considered In Analyzing When A Right Is "Clearly Established."

In analyzing whether it was "clearly established" that probable cause did not exist for the alleged "arrest," the Ninth Circuit disregarded petitioners' citation to state case law. Kraus, 793 F.2d at 1109-1110. Respondents deny the existence of a split among the federal circuits on this issue but fail to address Fourth Circuit cases holding that state authority should be considered. E.g. Wallace v. King, 626 F.2d 1157, 1161 (4th Cir. 1980).

Instead respondents attempt without success to distinguish the Washington cases cited by petitioners and ignored by the Ninth Circuit. In State v. Gluck, 83 Wn.2d 424, 518 P.2d 703 (1974) the Washington State Supreme Court found probable

cause to arrest occupants of a car where the only connection between it and the crime was that the car in early morning had pulled away from a tavern prior to the discovery of a burglary there. In State v. Young, 39 Wn.2d 910, 239 P.2d 858 (1952) probable cause existed where the only connection between the vehicle and a robbery was that minutes before the crime a similar truck had driven past the business. In State v. Donohoe, 39 Wn.App. 778, 695 P.2d 150 (1985), the Washington Appellate Court continued to adhere to these precedents and found probable cause to arrest the occupants of a vehicle though the only connection between it and the crime was that a similar automobile had been seen in the area of a recent vehicle prowl.

Because petitioners are immune if Washington precedent is considered and

because there is a split among the circuits as to whether a state's decisional law should be analyzed, certiorari should be granted. See Sup. Ct. R. 17.1(a).

## III. CONCLUSION

For the reasons stated in the Petition and above, it is respectfully requested that a writ of certiorari issue.

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